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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 937

STATE OF ILLINIOS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,
(Defendants) Appellees.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

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(Defendants) Appellees.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

This is an appeal from the judgment of a three-judge District Court dismissing a complaint seeking to set aside and to enjoin enforcement of an order of the Interstate Commerce Commission authorizing Chicago North Shore & Milwaukee Railway (herein called the "North Shore") to abandon its entire electric railroad.

The attack on the validity of the Interstate Commerce Commission's order is based upon the following propositions:

1. That (as decided in *United States* v. *Chicago N. S. & M. R. R.*, 288 U. S. 1) the North Shore's railroad

is an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation, and hence is excluded by Section 1 (22) of the Interstate Commerce Act (Title 49 USC) from jurisdiction of the Interstate Commerce Commission to authorize abandonment; and

2. That even if (as we deny) the North Shore's railroad is not excluded from the jurisdiction of the Interstate Commerce Commission by Section 1(22) of the Interstate Commerce Act, the Commission has no jurisdiction to authorize abandonment of the separate intrastate service of the North Shore's railroad.

Appellees, Interstate Commerce Commission and Chicago North Shore & Milwaukee Railway (the "North Shore") have filed separate motions to affirm the judgment appealed from, contending that the above propositions "present no substantial question warranting plenary consideration by the Court."

We submit that that contention cannot be sustained.

I.

THE QUESTION AS TO WHETHER THE NORTH SHORE'S RAILROAD IS AN "ELECTRIC INTERURBAN RAILWAY" OF THE TYPE EXCLUDED BY SECTION 1(22) OF THE INTERSTATE COMMERCE ACT FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION TO AUTHORIZE ITS ABANDONMENT.

The primary question in this case is whether the Interstate Commerce Commission had jurisdiction to authorize abandonment by the North Shore of its railroad.

Paragraph (18) of Section 1 of the Interstate Commerce Act (Title 49 USC) provides that no carrier subject to the

Act shall abandon any portion of a line of railroad "unless and until there shall have been obtained from the Commission a certificate that present or future public convenience and necessity permit of such abandonment."

Paragraph 22 of Section 1 of the Act provides that the jurisdiction of the Commission to authorize abandonment "shall not extend to * * * *interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.*"*

If the North Shore's railroad is of the type defined in the italicized portion of the foregoing quotation from Section 1(22), the Interstate Commerce Commission had no jurisdiction to authorize its abandonment, and the Commission's order purporting to authorize abandonment is void. It would then follow that under Paragraph (20) of Section 1 of the Interstate Commerce Act and Section 2325 of the Judicial Code (Title 28) the order of the Commerce Commission purporting to authorize abandonment may be set aside and the North Shore may be enjoined from abandoning its railroad pursuant to that order.

A.

The Controlling Effect of the Decision of the Supreme Court in United States v. Chicago N. S. & M. R. R., 288 U. S. 1.

1.

The Grounds of the Decision—Irrespective of "Administrative Construction."

In *United States* v. *Chicago N. S. & M. R. R.*, 288 U. S. 1 (referred to in the Jurisdictional Statement and in this brief as "the prior North Shore Case") this Court construed a like clause in Paragraph (1) of Section 20a of the

* Note: Italics are ours, here and elsewhere, unless otherwise noted.

Interstate Commerce Act, excluding from the jurisdiction of the Commission over security issues of an interstate carrier that is classified as:

> "* * * a street, suburban, or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation."

The language of the exclusion clause is thus identical (except for substitution of the singular for the plural) with that in Paragraph (22) of Section 1 here involved.

And the purpose of each exclusion clause is the same—i.e., to exempt from the jurisdiction of the Interstate Commerce Commission, interurban electric railways of the type specified.

Where the same words or phrases are used with a similar purpose in different parts of the same statute, they will be presumed to have the same meaning and application.

> *Folker* v. *Johnson*, 230 Fed. 2d (CA 2) 906 (908).
> *Schooler* v. *United States*, 231 Fed. 2d (CA 8), 560 (563).
> *Com. of Int. Rev.* v. *Ridgeway's Estate*, 291 Fed. 2d (CA 3) 257 (259).

As was said in the last cited case (291 Fed. 2d at p. 259):

> "Where a word or phrase is used in different parts of the same statute it will be presumed to have the same meaning throughout * * * [citing cases] * * * The need for uniformity becomes more imperative where the same word or term is used in different sections that are similar in import and content."

In the opinion in the prior *North Shore* case (288 U. S. at p. 10) in distinguishing *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299 (construing the exclusion clause in Section 1(22) of the Interstate Commerce Act and holding that clause not to be applicable to

the Piedmont Railroad), this Court noted that the exclusion clause in Section 1(22) is "couched in the same language" and therefore is subject to the same construction as the exclusion clause in Paragraph 1 of Section 20a, in issue in the prior *North Shore* case. The *Piedmont* case was distinguished wholly on the ground that the Piedmont Railroad had many freight cars and derived about 95% of its income from freight, while (as the Court said 288 U. S. at page 10) the North Shore's railroad is:

> "A typical example of an interurban electric line for passenger service which has developed in addition such freight traffic as could advantageously be conducted without interfering with the performance of the main purpose of the carrier."

The Court comments as follows on the similarity and difference between the clauses in the three separate sections of the Act excluding certain types of interurban electric railways from the jurisdiction of the Interstate Commerce Commission (288 U. S. at p. 11):

> "Interurban electric railways are expressly saved from the requirements of Paragraphs 1(18) to (21) inclusive, 15a and 20a. The language of the excepting clauses in the first and third instances is identical except for the use in one case of the singular and in the other of the plural number. That applicable to 15a, which is the section providing for fixing rates to yield a fair return, and for recapture, differs in substance from the two others and is: 'excluding . . . (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight*. . .'" (Italics are the Court's.)

The Court points out (288 U. S. pp. 11-12) that the Interstate Commerce Commission had made repeated recommendations to Congress that the exclusion clause in Section 20a(1) and Section 1 (22) be amended by excepting

therefrom electric railroads "*engaged in the general transportation of freight*" but that Congress had refused to make that amendment. In fact, as the Court pointed out, the federal authorities had, in effect, held that the North Shore was within the exception in Section 15a from jurisdiction of the Interstate Commerce Commission because it was an interurban electric railroad of the type specified and because it was "not engaged in the general transportation of freight."

The court, after a full review of the facts—and irrespective of "administrative construction" held (288 U. S. at pp. 10-11) that "as a matter of first impression" the Court "would be inclined to hold Section 20a inapplicable"—i.e., that (independently of administrative construction) the North Shore's railroad is within the clause excluding interurban electric railways from the jurisdiction of the Commission.

The Court then reviewed the past practice of the North Shore in going to the State Commission for authority to issue securities—on the assumption that the North Shore's electric railroad was within the clause excluding the Interstate Commission from jurisdiction—and emphasized the fact that the Interstate Commission had not objected to that practice. The Court concluded, therefore, that "administrative construction" of the exclusion clause confirmed "the first impression" that the North Shore's railroad was an "interurban electric railway" excluded from jurisdiction of the Interstate Commerce Commission.

2.

The Effect of "Administrative Construction."

The Appellees, in their motions to affirm, seek to distinguish the decision in the *prior North Shore* case (288 U. S. 1) on the ground that it was based on "equitable" consider-

ations—on a sort of estoppel arising out of the fact that securities of a larger face value had been theretofore issued under state authority, and without objection of the Interstate Commerce Commission.

As appears from the above summary of this Court's opinion in the *prior North Shore* case, it is apparent that the decision would have been the same irrespective of "administrative construction."

Furthermore, if "administrative construction" of Section 20a of the Interstate Commerce Act requires a decision that the North Shore is "an interurban electric railway not part of a general steam railroad system of transportation," and hence excluded from jurisdiction of the Interstate Commission, it must follow that a like construction must be given to the same exclusion clause in Section 1(22) of the Act. The North Shore can hardly change its character back and forth according to the forum in which it desires to prosecute its particular action.

The "administrative construction," as indicated by the North Shore's actions prior to the institution of the 1954 application for leave to abandon the Shore Line, is in accord with the decision that the North Shore is within the clause excluding it from the jurisdiction of the Interstate Commerce Commission.

In 1948, when the first application was made for leave to abandon the Shore Line, the North Shore filed its application with the Illinois Commerce Commission and resisted a contention that the Interstate Commerce Commission had jurisdiction.

In 1953, when the North Shore went through its reorganization and "spun off" a large part of its assets to a new holding company (now known as "The Susquehanna Corporation") the application for approval of the reorganization was made to the Illinois Commission.

It was not until 1954 when the second application for leave to abandon the Shore Line was filed that the North Shore shifted its position and filed the application with the Interstate Commission—as well as with the Illinois and Wisconsin Commissions.

And, as appears from the report of the division of the Interstate Commerce Commission that decided the 1954 "Shore Line" abandonment case (290 ICC at p. 798) one of the three Commissioners of the division dissented on the ground that the Interstate Commerce Commission did not have jurisdiction—citing the prior *North Shore* case —288 U. S. 1.

3.

There Has Been No Change in the Character of The North Shore's Railroad Service; the Decision in the Prior North Shore Case Is as Apt Today as When Rendered in 1932.

The principal ground upon which Appellees seek to evade this Court's decision in the *prior North Shore* case is that there is an interchange of freight by the North Shore's railroad with various connecting interstate carriers.

But that same condition existed when the *prior North Shore* case was decided in 1932. In fact, at that time the North Shore had 114 freight cars of its own and 22% of its revenue was derived from freight. (288 U. S. at p. 9.) During the period involved in the instant case, the North Shore owned no freight cars and its freight revenue had dropped to 14% of the total revenue. No freight is handled at either the Chicago or Milwaukee Terminals and the passenger cars are all of the type that can operate on the elevated tracks in Chicago and over streetcar tracks in Milwaukee.

The following statement in the opinion in the *prior North Shore* case (288 U. S. pp. 9-10) is as apt today as in 1932:

> "Locomotives are not employed in the passenger service, the cars having installed electrical equipment, and being somewhat shorter and narrower than standard passenger railroad coaches. Freight is hauled by electric locomotives. * * * The company maintains no facilities for receipt or delivery of carload freight at its terminal in Chicago and Milwaukee, and cannot accomplish inter-change of such freight at either, *connections for this purpose being outside those cities.*
>
> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. The freight business is subsidiary to this primary function, and is not fairly comparable to that ordinarily transacted by a standard steam railroad. Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business. The main terminals serve only the passenger and merchandise freight traffic.
>
> We have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier."

As appears from the above quotation, the interchange of freight with other railroads, at connecting points outside of the City limits, was then in effect as it is now. But, as the Court stated, such freight handling was [as it is now] incidental in character, compared with the primary purpose of the North Shore—i.e., to operate a "typical * * * interurban electric line for passenger service," with freight service as a minor side line.

It cannot now be held that this incidental freight business destroys the character of the railroad as "an interurban electric railway" without wholly disregarding the decision of this Court in the *prior North Shore* case.

B.

Comments on Authorities Relied on by Appellees.

The principal case relied on by Appellees in support of their argument on the jurisdictional question is *Sprague* v. *Woll*, 122 Fed. 2d (CA 7) 128. That case involved a question as to whether the North Shore's railroad is one of the carriers exempted from the application of the Railway Labor Act by the following provision of that Act. (122 Fed. 2d at p. 129):

> "* * * the term 'carrier' shall not include any street, interurban or suburban electric railway, unless such railway is operating as a part of a general steam railroad system of transportation, *but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.*"

The provision quoted thus excepts from the exemption granted to certain interurban electric railways: (1) interurban electric railways that are "part of *a* [*i.e.*, a particular] steam railroad system of transportation," and (2) interurban electric railways that are "part of *the* [*i.e.*, the country-wide] general steam-railroad system of transportation."

The case was decided on the ground that the North Shore's railroad (although not a part of "*a* steam railroad system of transportation") could be considered to be "operating as a part of *the* general steam railroad system of transportation," (122 Fed. 2d at p. 130)—and hence that the decision in the *prior North Shore* case was not in point.

In distinguishing the *prior North Shore* case, the Court in *Sprague* v. *Woll* rests its conclusion on a misinterpretation of the following statement of this Court in the *prior North Shore* case (288 U. S. at pp. 10-11):

> "As a matter of first impression we [the Court] should, though the decision is not free from difficulty, be inclined *to hold Section 20a inapplicable.*" [i.e., to hold the clause exempting interurban electric roads from the Interstate Commerce Commission's jurisdiction *to be applicable.*]

The Court of Appeals, in *Sprague* v. *Woll*, in commenting on the foregoing passage from the Supreme Court's opinion, said (p. 131):

> "It appears obvious from a reading of that decision that the Court, *while entertaining serious doubts of the correctness of the determination if presented as a matter of first impression*, was moved by equitable considerations to resolve that doubt in favor of the lower court decision under the facts presented."

As appears from the foregoing quotation, the Court, in *Sprague* v. *Woll*, in commenting on the Supreme Court's opinion in the *prior North Shore* case, treated it as if the Supreme Court had held that "as a matter of first impression" the Court deemed the *exemption* to be *inapplicable*, and Section 20a to be *applicable*, which is exactly contrary to what the Court held. There was thus, in *Sprague* v. *Woll*, a complete misinterpretation of the Court's opinion in the prior *North Shore* case.

Sprague v. *Woll* was discussed at length and distinguished by the same Court of Appeals in *In Re Chicago N. S. & M. R. Co.*, 131 Fed. 2d (CA 7) 458 (Cer. Den. 318 U. S. 768), referred to at pages 15-16 of the Jurisdictional Statement. In that case, in holding the North Shore's railroad to be within a provision of Section 77 of the Bankruptcy Act (applying to railroads) excluding therefrom "interurban electric railroads which are not part of a general railroad system of transportation," or which have less than half their business in freight, the Court said (pp. 460-1):

"We think there can be no question but that this Road is not 'operating as a part of a general steam-railroad system of transportation.' * * *

In *Sprague* v. *Woll, supra*, the Commission had held that the Road was part of *the* general steam railroad system of transportation, on the basis of the characteristics referred to above, including a substantial revenue from the carriage of freight in standard equipment. In view of this fact, we did not consider it necessary, in reviewing the case, to discuss the preceding limitation on the exemption contained in the Labor statutes 'unless such railway is operating as a part of *a* general * * system * * *,' although the Commission and the United States Attorney had discussed the distinction inherent in the two phrases. In the case now before us, however, a different exclusion from the exemption is involved. Since the Road is not eligible for reorganization under Section 77 *if it is a street, a surburban or interurban electric railway, not operated as a part of a general railroad system of transportation or* which does not derive more than 50% of its operating revenue from the transportation of freight in standard steam railroad freight equipment, it becomes necessary for us to determine the meaning of the first phrase. We agree with the District Court that 'the use of the word "a" before the words "general railroad system" * * * clearly denotes that Congress there contemplated some *particular* operating railroad system exercising management, control and supervision over a particular street, suburban or interurban.' Hence in view of the evidence that no such control or supervision exists, the Road is not eligible for reorganization under Section 77 unless it derives more than 50% of its revenues from transportation of freight.'"*

Furthermore, the Interstate Commerce Act contains no provision such as that in the Railroad Labor Act (under construction in *Sprague* v. *Woll*) conferring on the Inter-

* Note: The italics in the foregoing quotation and the asterisks denoting omissions in subquotes are the Court's.

state Commerce Commission jurisdiction to determine whether or not a carrier is within its jurisdiction, so long as there is "substantial evidence" to justify the finding.

The determination as to whether a railroad or part thereof is exempted by Section 1(22) of the Interstate Commerce Act from the jurisdiction of the Interstate Commerce Commission "is a mixed question of fact and law left by Congress to decision of a Court—not to final determination of either the federal or a state commission."

United States v. *Idaho*, 298 U. S. 105 (109).
Yonkers v. *United States*, 320 U. S. 685 (689).

II.

EVEN IF (AS WE DENY) THE NORTH SHORE'S RAILROAD IS NOT EXCLUDED FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION BY SECTION 1 (22) OF THE INTERSTATE COMMERCE ACT, THE QUESTION REMAINS AS TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION TO AUTHORIZE ABANDONMENT OF THE SEPARATE INTRASTATE SERVICE.

The argument on this point in Appellees' Motions to Affirm rests on two propositions:

1. That the interstate and intrastate services are "inextricably intertwined" or "integrated and commingled" so that abandonment of the interstate service necessarily requires simultaneous abandonment of the intrastate service; and

2. That North Shore's intrastate service competes with the passenger service of the North Western and Milwaukee railroads; that continuance of that intrastate service therefore casts a burden on the interstate commerce of those railroads; and that jurisdiction is thus conferred on the Interstate Commerce Commis-

sion to remove the burden by authorizing abandonment of the intrastate service of the North Shore.

Neither proposition is sound.

A.

The Interstate and Intrastate Services of the North Shore's Railroad Are Severable and Are Not "Inextricably Intertwined."

The statements in Appellees' motions to affirm that the intrastate and interstate services of the North Shore's railroad are "inextricably intertwined" or "integrated and commingled" rests on assertion only.

As appears from the map opposite page 9 of the Jurisdictional Statement, the intrastate service between Chicago and Mundelein has its northwestern terminus on a separate branch not used at all by interstate trains.

The intrastate trains to Waukegan and Zion pass over tracks also used by the interstate trains; but their terminus is in Waukegan or Zion and they do not affect interstate traffic.

The division of trains and passenger traffic between separate interstate and intrastate trains is as follows (Ex. 74, C-91):

	Trains 5/31/60-5/31/61		Number of Passengers
Interstate	Number	Per Cent	Per Year (1958)
Between Chicago and North Chicago Junction and Milwaukee	48	47.5%	2,601,908
Intrastate			
Between Chicago and Waukegan or Zion	21	20.8%	1,175,692
Between Chicago and Mundelein	32	31.7%	1,374,095
Total Intrastate	53	~~52.5%~~ 52.5%	2,549,787

For the 12 months ending May 31, 1961, due to a rapid increase in population of the suburban areas served, the passenger traffic on the intrastate trains had increased so that it exceeded that on the interstate trains, not only as to number of trains, but strikingly, as to revenue. The 12-month period ending May 31, 1961 was divided between interstate and intrastate traffic as follows (Ex. C-14):

	Amount	Per Cent
Revenue from Interstate Traffic	$1,412,012	30.73%
Revenue from Wisconsin Intrastate Traffic	$ 351,199	7.49%
Revenue from Illinois Intrastate Traffic	$2,923,126	62.38%

The separate intrastate service is therefore an important part of the business of the North Shore's railroad.

It was treated as separate by the North Shore when it filed the application for authority to abandon—not only with the Interstate Commerce Commission, but also with the State Commissions of Illinois and Wisconsin. The Illinois Commission, acting on the North Shore's application, by order entered after a full hearing, denied the application. No appeal was taken from that order and it is final.

In the original report of the Examiner of the Interstate Commerce Commission in this case, he recommended (assuming jurisdiction in the Commission) that abandonment be authorized only "as to interstate and foreign commerce."

If the order of the Interstate Commerce Commission should be held valid insofar as it authorizes abandonment of interstate commerce, there will be no interstate commerce left to be adversely affected by continuance of the intrastate service. There can, therefore, be no basis for a contention that the Interstate Commerce Commission has

jurisdiction over the separate intrastate service because it casts a burden on the interstate commerce of the railroad.

Texas v. Eastern Texas R. R. Co., 258 U. S. 204 (217-218).

Colorado v. *United States*, 271 U. S. 153 (169-170).

B.

PUBLIC CONVENIENCE DOES NOT REQUIRE ABANDONMENT OF THE NORTH SHORE'S INTRASTATE SERVICE ON THE GROUND THAT ITS CONTINUANCE CASTS AN UNDUE BURDEN ON THE INTERSTATE SERVICE OF THE NORTH WESTERN AND MILWAUKEE RAILROADS.

The North Shore's railroad furnishes a unique service between northern and northwestern suburban areas of Chicago and the Chicago Loop and adjoining areas of the City to the north and south served by the elevated and subway trains.

The North Western and Milwaukee Railroads furnish no comparable service.

The tabulation at page 20 of the Jurisdictional Statement, setting forth the comparative patronage of the North Shore, North Western and Milwaukee Railroads from competing stations, shows the great preponderance of the passenger traffic on the North Shore, as compared with the passenger traffic from competing stations on the North Western and Milwaukee Railroads.

The North Western and Milwaukee Railroads were not parties to the proceedings before the Interstate Commerce Commission.

The evidence as to comparative patronage shows that "public convenience and necessity" will be much better served by continuance of the North Shore's service than by requiring its discontinuance for the benefit of competing lines which do not, and cannot, render like service.

In fact, the evidence as to the rapidly increasing population in the suburban area served indicates that more, rather than less, mass transportation will be needed.

III.

THE ALLEGED OPERATING LOSSES.

In the North Shore's motion to affirm (although not in the motion of the Interstate Commerce Commission) emphasis is again placed on the alleged operating losses of the North Shore's railroad.

The existence, or non-existence, of operating losses has no bearing on the jurisdictional issue here involved. If the Interstate Commerce Commission has no jurisdiction, it cannot grant the relief asked. Congress has elected to leave to the state authorities the power and duty to pass on the questions raised and to grant any relief that may be called for.

There is, however, a substantial question on the record as to whether the losses could not have been eliminated by improved operating methods and the fixing of adequate fares. According to the testimony of Protestants' (Appellants', here) expert witnesses, a saving of approximately $439,000 per year could have been effected by improved operating methods and (except for a questionable item of "deferred maintenance") the loss could have been entirely eliminated. (Appendix IV to Interstate Commerce Commission Report of May 10, 1962, 317 I.C.C. at page 203, set forth at page numbered 203 in the Appendix to the North Shore's motion to affirm.)

When the abandonment of the Shore Line was authorized by the Interstate and Illinois Commerce Commissions, after joint hearings in 1954, assurances were given by the officers of the North Shore that the remainder of the railroad could be operated at a profit.

At the same time, however, a report was prepared by Charles S. Leonard, then of Duff, Anderson & Clark, financial analysts, and later president of the Susquehanna Corporation and the North Shore, which recommended disposal of the remaining railroad properties after a five-year interval, irrespective of profit or loss, so as to provide a "tax shelter of something over $20,000,000" (based on "paper" losses from book values of predecessor corporations) to apply against income of the holding company from its other profitable ventures.

The plan proposed—and meticulously followed—is summarized in the following extracts from the Duff, Anderson & Clark Report:

> "If some or all of the railroad operations could be disposed of through abandonment and/or sale, considerable cash would be made available to the parent by freeing the working capital and by proceeds by disposition. More important, however, is the immense tax shelter inherent in the railroad subsidiary because of losses which are certain to be realized upon disposition of its fixed assets." (Ex. 112, p. 52.)
>
> "Chicago, North Shore and Milwaukee Railway regularly reports the very substantial net losses. These are after heavy depreciation charges, with the result that the cash losses of that company are not great, and are more than offset by the cash gains from the earnings and depreciation of other members of the group." (Ex. 112, p. 6.)
>
> "As we stated earlier, the ultimate disposition of the remaining railroad assets and operations presents a number of problems which cast some doubt on the likelihood that it can ever be accomplished. Moreover, it would not be desirable to attempt it prior to the time that the Company had utilized all of the tax shelter to be made available by other means and achieved the strongest possible capital position." (Ex. 112, p. 26.)
>
> "We have assumed that the remaining railroad

assets could be sold for approximately 10% of their net book value or some $2,350,000,* thus creating an additional loss [i.e., a "tax shelter"] of more than $21,000,000." (Ex. 112, p. 54, par. 16.)

"We have recommended that the Company make an effort to dispose of all of its railroad assets and operations, but we believe that the disposition of the railroad assets remaining after abandonment of the shore line should be postponed until the then existing tax shelter has been absorbed and the Company is in a capital position to take advantage of the new and larger tax shelter that would stem from the disposition of the rest of the railroad assets. On the assumption that this could be accomplished, we have assumed that it would take place at the end of four and a fraction year period referred to just above." (Ex. 112, p. 54, par. 15.)

The application to the Interstate Commerce Commission for authority to abandon the remainder of the railroad was timed to meet the "four and a fraction year" interval recommended in the last-above quotation from the Duff, Anderson & Clark Report. It is apparent that its primary purpose was to effect the additional tax shelter of $20,000,000 or more to be applied against the Susquehanna Corporation's taxable income for the ensuing five years.

Furthermore, there was testimony that Mr. Mason, now president of the North Shore, stated that "If he had a free hand he could operate the railroad at a profit," (Rec. 3744-5) and Mr. Mason testified that under those circumstances "he might be able to do more with it." (Rec. 4071-

* Note: The motion of the North Shore to affirm asserts (p. 2) that "no offer to purchase, *complying with the Commission's order*, was ever made." The inference, apparently intended, that no offer to purchase at a fair salvage value was made, is contrary to fact. Two such offers were made by a responsible party intending to continue operation of the railroad, but both offers were rejected.

2.) And the testimony of transportation experts for the present Appellants supports those conclusions.

The question as to the presence or absence of losses, and as to whether they could have been avoided is, however, not relevant on this appeal.

The cases cited in the North Shore's motion to affirm as to the application of the 14th Amendment are not apposite. No question as to the 14th Amendment was, or could be, raised before the Interstate Commerce Commission or in the District Court in this case.

For the reasons set forth in the Jurisdictional Statement (pp. 22-24), as supplemented by the foregoing Brief, we submit that the questions presented by this appeal are substantial and of such serious import as to require plenary consideration with briefs on the merits and oral argument for their determination; that Appellees' motions to affirm should be denied; and that probable jurisdiction should be noted.

Respectfully submitted,

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